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ABSTRACT

The issue of ownership of intellectual property is central to scholarly communication of expressed ideas. Our knowledge property arrangements are key to success in the competitive global markets of the 1990s. There is concern that recent social, technological, and economic changes in the scholarly communication system are affecting the balance between the creators and users of scholarship. This balance involves the "fair use" of copyrighted works for teaching, scholarship, and research activities. Different models for balancing the public good with incentives rewarding individual creativity include the development of an electronic network for scholarly communication; strengthening the role of intellectual property collectives; development of a public corporation to subsidize scholarly communications; and establishing new contractual rights agreements through intermediaries. (Author)

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"Intellectual Property Rights and Fair Use:
Strengthening Scholarly Communication in the 1990's"

"The Great Balancing Act"
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Abstract

The issue of ownership of intellectual property is central to scholarly communication of expressed ideas. Our knowledge property arrangements are key to success in the competitive global markets of the 1990's. There is concern that recent social, technological, and economic changes in the scholarly communication system are affecting the balance between creators and users of scholarship. This balance involves the "fair use" of copyrighted works for teaching, scholarship, and research activities. Different models for balancing the public good with incentives rewarding individual creativity include the following: development of an electronic network for scholarly communication; strengthening the role of intellectual property collectives; development of a public corporation to subsidize scholarly communications; establishing new contractual rights agreements through intermediaries.

I. Introduction

It is a pleasure for me to be with you this morning and to address a topic of crucial importance to higher education and research effectiveness: the balance between knowledge ownership and access. The issue of ownership of intellectual property is central to scholarly communication of expressed ideas. In addition, knowledge property arrangements are key to success in the competitive global markets of the 1990's.

My work over the past seven months has concentrated on the

National Commission's planning for the White House Conference on Library and Information Services. In preparing to talk with you today about "The Great Balancing Act" at this Ninth Annual OCLC Conference of Research Library Directors, I felt like I was taking a conceptual vacation from my everyday concerns. I think you can understand my current depraved state when I find solace in comparing intellectual property issues to a holiday.

For most academic librarians, copyright is a topic that produces a state of "MEGO" or "my eyes glaze over." However, I consider the intellectual property ownership issue to constitute the central policy core of the emerging National Research and Education Network. This issue is also the keystone of our research achievements, our technological effectiveness, and our economic productivity.

My work at Faxon, before I came to the National Commission, involved several interesting issue areas related to research libraries and scholarly publishing. In addition to studying serial pricing trends, I worked with the Society for Scholarly Publishing developing programs on the impact of digital networks on scholarly publication ownership. Understanding the different backgrounds, economic forces, technologies, and perspectives of those who purchase, contribute to, and publish scholarly and academic journals is an exercise in appreciating diversity and ambiguity. There are few individuals associated

with the scholarly communications process who do not express strong views about serial price increases or about the global economic challenges facing academic libraries and scholarly journal publishing.

My purpose this morning is to stimulate your thinking about the relationships between producers and users of scholarly information resources, in order to provide the foundation for us to formulate strategic solutions and resolutions for expanding user access to information in the 1990's. Whatever solutions and alternative proposals arise, their successful implementation must accommodate a balance between all the players in the complex system of knowledge creation and use.

The ideas I share today about the "fair use" provision of the Copyright Law and future intellectual property ownership alternatives facing the scholarly community are my own personal views and may not necessarily reflect those of the National Commission or the U.S. government. These ideas are the results of thinking and pondering performed at Faxon and result from lessons I learned working in the Copyright Office in the mid-1980's.

II. Balancing Act Background

Two schools of thought about scholarly intellectual property

ownership are prevalent in these later days of the twentieth century. One school sees that we are entering a new era of unprecedented challenge and opportunity brought on by the rapid and pervasive spread of information technologies throughout the world. This school sees the convergence of the digital computational machine with advanced communication technology producing a qualitatively new state of affairs in the world of scholarly communication and interactions involving the exchange of knowledge. Proponents of this view call for a thoughtful re-conceptualization and, perhaps, a radical re-structuring of learned information management systems to address the imbalances which threaten to corrupt the process and disturb the balance between users and owners of scholarship.

This school of "new order thinkers" can be contrasted with those who view recent developments in scholarly communication as incremental changes. This more conservative viewpoint characterizes recent changes as a series of adjustments to a system of scholarly communication, interaction, and exchange which does not call for a fundamental restructuring of our intellectual property processes. In fact, this view sees our knowledge ownership/access balance preserved into the next century with only minor modifications to the copyright law despite the assimilation of radical new electronic technology into the scholarly communication process.

As stated earlier, my purpose today is to stimulate your thinking. To do so, I will explicate the issues, rationales, problems, and tensions which are central to our evolving scholarship ownership and access policies. In outlining the policy issues I will briefly describe future models for balancing knowledge property and access rights of owners and users.

Before entering the esoteric legal arena of knowledge ownership protection and access, we need to recognize that we are not alone. Balancing intellectual property ownership and access rights is of concern to attorneys and, more recently, to policy analysts in economics and technology. Few academic or research librarians I know would claim an informed expertise in these fields. I readily admit that I am not an expert in intellectual property law, economic policy, or information technology policy.

As a librarian, however, I appreciate the critical role of academic librarians in the scholarly communication system. I am concerned that the academic and research library community plan strategic policy alternatives which will enable our research institutions to continue the preservation and diffusion of knowledge. We must assume roles as active and informed players in these issues because we as scholars ourselves have a professional obligation to determine the future nature and conduct of scholarly interactions.

III. Balancing Ownership and Access: Fair Use

Balance is stability characterized by the cancellation of all forces by equal opposing forces. A balance is struck when a state or position between extremes is achieved. Change dynamics threaten balance. The balance Congress envisioned by the "fair use" doctrine in Section 107 of the U.S. Copyright Law of 1976 allows exemptions from exclusive ownership rights and from infringement for certain educational uses of copyrighted works. "Fair use" is use that promotes progress of knowledge, literature, and the arts and does not deprive the creator of the work an appropriately expected economic reward.

Closely related to "fair use" is the exemption provided in the copyright statute for library and archives copying. Sections 108(d) and (e) permit libraries to make copies for a user under certain specified circumstances, provided that the copies are used only for private study, scholarship, or research. This limitation on exclusive rights allows libraries to reproduce and distribute single copies of material. Section 108 does not allow systematic reproduction or distribution, nor does it allow libraries to use interlibrary arrangements which substitute for subscription or purchase of a work.

Thus, specific legal accommodation is authorized by the

copyright statute to serve the public educational need for access at the expense of an appropriately expected economic benefit to owners. The educational uses inherent in the "fair use" doctrine include copies made for teaching, scholarship, and research. The "fair use" provisions in Sections 107 and 108 set guidelines for copying exemptions including consideration of the purpose and character of use, the nature of the work, the amount or portion used, and the impact of use on the potential commercial market or value of the work.

The balancing act we are concerned with involves weighing the protection and incentives legally granted to authors and publishers of copyrighted scholarly works, against the public demand for widely accessible, fast, inexpensive, and comprehensive dissemination of ideas and research findings expressed in scholarly and research communications and publications. Thus, the challenge which the "fair use" provisions address is to maintain a balance between protecting the property rights of owners with the access needs of scholars, students, faculty, researchers, and other educational users. Not all property disputes are balanced by Federal statute. Contracts between parties serve as a means for reaching agreement in real estate, business, and publishing. In the area of intellectual property, however, the competing needs of owners and users are balanced by federal law which awards limited monopolies to owners.

In the late 1970's when the current copyright law was enacted, attention was directed to the impact of photocopying and reproduction technology on publishers and librarians.

Photocopying equipment technology has evolved rapidly since that time, as have other digital magnetic and optical information storage and transmission technologies. Current trends which are often cited as threats to the "fair use" balance result from an mixture of economic, technological, and social transformations which together produce a complex intellectual property array of competing interests. These trends include:

1. increases in the volumes and demands for scholarly and scientific research and the enhanced value of these communications as the raw material for social progress, economic development, technical productivity, and industrial competitiveness;
2. electronic technologies for the creation, exchange, and dissemination of knowledge products which introduce new elements and opportunities into the balance of economic and social interests. These same transforming technologies present challenges to the traditional roles of authors, publishers, librarians, and users of scholarly information;
3. increasingly competitive global knowledge markets which preclude strictly national solutions that fail to address international investments in knowledge creation, ownership, and dissemination;
4. large scale research investments by commercial industries geared to commercial success which pose threats to the non-monetary academic reward systems, traditionally associated with publication in scholarly journals.

The combined effect of these trends is to exert tension on the "fair use" balance established by the copyright law. In

addition, problems of ownership determination, delays in obtaining permissions, and in difficulties with royalty payment to owners, all pose significant problems for a balanced intellectual property system. In the final analysis, knowledge expressed through information technologies appears to be qualitatively different than printed knowledge. This difference, some would maintain, is based on different legal and economic principles that call for a new regulatory climate, one that is designed not for printed knowledge, but which is specifically designed to balance the competing digital knowledge needs of owners and users in a high speed national network.

IV. New Balance Models

So, what is the new "fair" balance for users and owners of scholarly works in an electronic network ecology? Is a new conceptual framework needed to balance rights when interactive digital communication networks are blurring the distinction between consumers and creators of expressed knowledge? What new transactional framework is possible for scholarship ownership and access systems to function and for intellectual value exchanges to occur?

Several "New Balance" models could be considered in response to these questions. Each model presents an extension or projection of available technologies and structures. These

possible new models, presented to stimulate our strategic planning, are:

1. Scholarly Communication Network System:

Legislation for a National Research and Education Network, which has been proposed by Sen. Albert Gore in S. 272, the High-Performance Computing Act of 1991, introduced to Congress last month, appears to present the basis for a scholars' national electronic communication network. This system for publishing and accessing learned information could provide the basis for an electronic network to replace subscriptions to scholarly journals.

Such a network, envisioned by Sharon J. Rogers and Charlene S. Hurt in their Chronicle of Higher Education "Point of View" article in October, 1989, provides an interactive tool for academics to exchange written comments about research. Possible benefits of such a network include: more timely access to scholarly research, journal subscription cost savings, and greater university involvement with scholarly products. Scholarly journal publishers using the network could employ automatic procedures for tracking user access, determining usage charges, and billing users.

The Scholarly Communications Network System might provide an

effective technical model for balancing the needs of owners and users of scholarly information resources, and for achieving the "fair use" balance. But there is no guarantee that such a network would actually be used to author or access articles owned by scholars or their universities. Indeed, commercial scholarly publishers might institute hefty use-sensitive article access charges that would impede "fair use" access for both current material and for digital images of scanned retrospective printed articles.

What is certain, however, is that the blend of Federal, foundation, university, or private commercial funding required to establish and maintain such a scholarly network will in large part determine the policies, operations, and governance structure of such a system. Network infrastructure ownership will have a fundamental influence on the nature of the transactions occurring on this Scholarly Communication Network System and on the "fair use" balance.

2. Intellectual Property Collectives

Traditionally, copyright collectives or societies provide administrative and financial mechanisms for balancing rights and collecting fees paid by users to owners of scholarly works and knowledge properties. As an example, the Copyright Clearance Center currently administers rights for journal article copying

done by libraries. Such copyright collectives provide for decentralized enforcement of copyright owners' rights through a single specialized third-party organization providing collective economies of scale for many small transactions.

Essentially, intellectual property collectives provide an effective owner compensation model which facilitates user access to scholarly publications. The collectives do not necessarily assure that a "fair use" balance is achieved, nor do these administrative mechanisms assure that academic libraries or publishers of scholarly works will incur transaction costs for using the collective's services. Indeed, collective administration of usage fees may overlook or ignore "fair use" activities when transaction charges are bundled together or based strictly on usage, with no distinction among works of different kinds.

An intellectual property collective operating within a Scholarly Communications Network environment provides an interesting alternative model to consider. Under such an operation, "fair use" scholarly access transactions related to teaching, research, or scholarship would not be subject to fees according to system parameters. Once again, however, the effectiveness of this hybrid model in balancing the rights of owners and "fair use" depends in large part on the network system accounting mechanisms in place for network administration.

3. Corporation for Scholarly Communication

As the two earlier models demonstrate, the effective balance of user and owner rights in any system of scholarly communication depends largely upon the corporations, institutions, or agencies which provide the capital and operating funds necessary to establish and maintain such a system. To simplify a complex issue, let us say that there are three basic options for such a system of scholarly communication. The first involves funds from Federal appropriations, the second uses funding from private commercial concerns, and the third involves funds from a combination of public and private investments.

This third option presents a mixed-sector organizational structure analogous to the Corporation for Public Broadcasting (CPB), a Federally subsidized corporation. The CPB board determines the general policies that govern the operations of the Corporation, which was created to facilitate the development of public telecommunications in the U.S. The CPB directs payments to public television and radio stations to be used at their discretion for purposes related primarily to program production and acquisition for national distribution. Additional system-wide activities receive assistance through CPB financing. These activities include national satellite interconnection services and limited technical assistance, research, and planning services

to improve system-wide capacity and performance.

A Federally funded Corporation for Scholarly Communication, analogous to the CPB, might assume responsibility for the dissemination of research to the scholarly community, especially that research which is performed through Federally administered grants and contracts. Such a Federal operation, administered by an independent board, could provide a basis for "fair-use" which surpasses the doctrine included in the copyright law, providing subsidized user access to scholarly communication. Although this model option would appear to operate alongside current society and commercial scholarly publishers, just as CPB operates in conjunction with the commercial television networks, in actuality, publication of research funded by Federal sources in a Corporation for Scholarly Communication might instead divert valuable material from the commercial and society scholarly publishers products.

V. Conclusion

The electronic universities of the future require that our current academic and research library systems serve as the basis for building the learning systems of tomorrow. Bridging the gaps between university library systems, national digital networks, and systems used by scholarly publishers, service intermediaries, and scholars requires that we develop common policies which can

be shared by owners and consumers of scholarly information products.

We are struggling to understand the human engineering, legal, and social implications of the application of digital electronic technology to the information and research service support functions our institutions were established to provide. Shaping and interpreting this technology and our property ownership environment are forcing us to examine the nature and character of scholarship, learning processes, our interaction with information resources, our basic cognitive activities, and our cultural values expressed by our social and legal systems. These issues also provide an opportunity to re-examine the basic nature of our academic and educational enterprise, and especially, the information ecology of our organizations, including businesses, universities, scholarly publishers, and research institutions.

As we learn more about the impact of technology integration on our library and scholarly information systems, we are becoming increasingly aware of the necessity of avoiding a condition where we are prisoners of the technology or the law. Users must be the ultimate design authorities helping to shape the tools which meet the values and objectives inherent in our institutional missions. The users must also be involved in the architecture of our future information policies, including intellectual property ownership.

For technology or the law to become ends in themselves is to deny the human responsibility for the development of a thoughtful and responsive policy agenda in our free society. Our responsibility as information professionals and as academic librarians is to understand the consequences of our work, its impact on our lives and our society, and our role in shaping the future.

Biographical Note

Peter Young was appointed Executive Director of the U.S. National Commission on Libraries and Information Science (NCLIS) in August, 1990. NCLIS is a permanent, independent Federal agency responsible for advising the President and Congress on national library and information policy. At present, Mr. Young is involved with planning for the White House Conference on Library and Information Services which will be held in Washington, D.C. this July 9-13. Mr. Young's professional career has been in private industry, the Library of Congress, public, college, and academic libraries. Prior to NCLIS, Mr. Young directed the Faxon Institute for Advanced Studies in Scholarly and Scientific Communication. Mr. Young received his MLS from Columbia University in 1968.